UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 6-88-563

RUSSEL H. BUKOWSKI
and SHARON E. BUKOWSKI,

Debtors.

WAYNE DREWES, as Trustee for the Bankruptcy Estate of Russel H. Bukowski and Sharon E. Bukowski,

Plaintiff,

ADV 6-89-35

-v.-

UNITED STATES OF AMERICA, acting through Farmers Home Administration, HENRY BUKOWSKI and JOSEPH BUKOWSKI,

Defendants.

MEMORANDUM DECISION; ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; AND FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR SUMMARY JUDGMENT IN FAVOR OF HENRY BUKOWSKI AND JOSEPH BUKOWSKI

At Minneapolis, Minnesota, July 19, 1991.

The above-entitled matter came before the undersigned on remand from the United States District Court for the District of Minnesota following reversal of a judgment avoiding subrogees' rights to assert a perfected security interest in property of the estate. The judgment was entered pursuant to an order granting a motion by the Plaintiff for summary judgment. Consequently, that motion is pending again before this Court. This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate the Plaintiff's motion for summary judgment because its subject matter renders such adjudication a "core" proceeding pursuant to 28 U.S.C.

§ 157(b)(2)(K). The following Memorandum Decision shall constitute the Court's findings of fact and conclusions of law.[1]

UNDISPUTED FACTS AND PROCEDURAL HISTORY

On May 4, 1984, Farmers Home Administration ("FmHA") made the filings required by the Uniform Commercial Code ("UCC") to perfect its blanket security interest in, inter alia, all equipment the Debtors then owned or after acquired, which was security for a loan from FmHA to the Debtors. On July 17, 1985, First National Bank of Middle River (the "Bank") made the necessary UCC filings to perfect its security interest in a farm tractor, which was security for a loan the Bank made to the Debtors for the purchase of the tractor. The Bank's loan was guaranteed by Henry and Joseph Bukowski (the "Guarantors"). Both FmHA and the Bank made a number of subsequent UCC filings which did not affect the relative priority of their interests in the tractor.

On December 5, 1988, the Debtors jointly filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. By virtue of said filing, the tractor became property of the estate. Both FmHA and the Bank possessed perfected security interests in the tractor at the time the petition was filed.

On December 28, 1988, the Guarantors made payment to the Bank for the entire balance of principal and interest outstanding on the loan they had guaranteed. Immediately thereafter, the Debtors

[1] The Court bases its findings of fact and conclusions of law upon the pleadings, affidavits and memoranda submitted in support of and opposition to this motion, and the argument of counsel presented at the motion hearing.

transferred possession of the tractor to the Guarantors. On June 6, 1989, without the Guarantors' knowledge or consent, the Bank filed a statement terminating its security interest in the tractor.

The Plaintiff commenced this action on September 26, 1989 to compel turnover of the tractor and to avoid the Guarantors' interest therein under 11 U.S.C. § 544(a). The Guarantors subsequently relinquished possession of the tractor to the Plaintiff.

The Plaintiff moved for summary judgment on his claim for avoidance of the Guarantor's interest. At the motion hearing, all the parties indicated that no genuine issues of material fact existed and that summary judgment could be entered in favor of either the Plaintiff or the Guarantors, depending on the Court's interpretation of the law.

On January 29, 1990, this Court ordered entry of summary judgment in favor of the Plaintiff. Drewes v. United States (In re Bukowski), 109 B.R. 932 (Bktcy. D. Minn. 1990). On appeal, the district court reversed the judgment and remanded the cause to this Court for further proceedings. Drewes v. United States (In re Bukowski), Civ. No. 4-90-183 (D. Minn. May 17, 1990). The district court's decision was summarily affirmed by the court of appeals. Drewes v. United States, No. 90-5296MN (8th Cir. Feb. 25, 1991) (per curiam).

DISCUSSION

In my previous order, I granted the Plaintiff's motion for summary judgment based on my conclusion that a Minnesota court

would decide, as a matter of equity, that a judicial lien should be superior to a guarantor's right to assert a perfected security interest under the doctrine of subrogation if the guarantor's right did not mature until after the judgment lien attached. Drewes, 109 B.R. at 935 (citing Earl Dubey & Sons, Inc. v. Macomb Contracting Corp., 97 Mich. App. 553, 559, 296 N.W.2d 582, 585 (1980)). The district court, however, reached a contrary result. Apparently, the district court concluded that Minnesota and Michigan law, under which the Earl Dubey & Sons case was decided, differ on this issue. The district court opined that three Minnesota cases contradict the holding in Earl Dubey & Sons case. See First Nat'l Bank v. McHasco Elec., Inc., 273 Minn. 407, 141 N.W.2d 491 (1965); National Sur. Co. v. Webster Lumber Co., 187 Minn. 50, 244 N.W. 290 (1932); Barrett Bros. Co. v. St. Louis County, 165 Minn. 158, 206 N.W. 49 (1925). The court of appeals affirmed the district court's decision in an unpublished, per curiam decision.

The foregoing discussion, however, is dicta in the truest sense of the word. Section 509(a) of the Bankruptcy Code controls this issue:

> Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and which pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

11 U.S.C. § 509(a). Unfortunately, the parties did not cite section 509(a) in the memoranda they filed with this Court, and apparently they did not cite it in their appellate briefs filed with the district court and the court of appeals. Neither this

Court's previous decision nor the opinions of the district court and court of appeals mentions section 509(a).

A codebtor who transfers value to a creditor sufficient to satisfy the creditor's claim against the debtor after the debtor has filed a petition for bankruptcy relief is subrogated to the rights of the creditor under section 509(a). Feldhahn v. Feldhahn, 929 F.2d 1351 (8th Cir. 1991). The Guarantors were codebtors with the Debtors, and they paid the Bank's claim against the Debtors in full following the filing of the petition. Therefore, the Guarantors are subrogated to the Bank's perfected security interest in the tractor.[2] 11 U.S.C. § 509(a). Consequently, the Plaintiff cannot rely on the "strong-arm" powers of section 544(a) of the Code to avoid the Guarantor's interest in the tractor. Therefore, the Plaintiff's motion for summary judgment must be denied.

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[2] If the Guarantors had not asserted a right of subrogation, they might have been entitled to file a claim for reimbursement or contribution:

> If the codebtor pays the creditor postpetition but prior to allowance or disallowance, the codebtor's claim will be allowed to the extent paid, if otherwise allowable under §502, as if it were paid prepetition. 11 U.S.C. § 502(e)(2). Read together, § 502(e)(1)(B) and (e)(2) evince Congressional intent that the codebtor will be allowed his claim for contribution only to the extent he has paid the debtor's creditor. Section 502(e)(1)(C) then disallows any claim for contribution if the claimant has also asserted a right of subrogation under § 509, thereby requiring the codebtor to elect either a claim for contribution or one for subrogation. This statutory scheme thus protects the debtor's estate from making multiple payments on a single claim.

In re Baldwin-United Corp., 55 B.R. 885, 895 (Bktcy. S.D. Ohio 1985).

The Guarantors, however, are entitled to summary judgment, even though they did not formally move for such relief. A party which has not made a cross-motion for summary judgment is nonetheless entitled to summary judgment where, as here, the party has defeated the opposing party's motion for summary judgment, the parties agree that no genuine issues of material fact exist, and they concur that one of them must be entitled to judgment as a matter of law. Northland Greyhound Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees, 66 F. Supp. 431, 433 (D. Minn.), appeal dismissed, 157 F.2d 329 (8th Cir. 1946). The Guarantors are entitled to judgment as a matter of law under section 509(a) of the Code. 11 U.S.C. § 509(a).

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The Plaintiff's motion for summary judgment is denied; and

2. Henry Bukowski and Joseph Bukowski shall have judgment declaring that their right to assert a perfected security interest in a 1979 855 Versatile 4X4 tractor cannot be avoided by the Plaintiff under 11 U.S.C. § 544(a).

LET JUDGMENT BE ENTERED ACCORDINGLY.

Nancy C. Dreher
United States Bankruptcy Judge